(21)

FILED
FEB 1 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 693

L. & C. MAYERS CO., INC.,
Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ANDREW B. TRUDGIAN,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Petition for a Writ of Certiorari	1
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Specification of Errors to Be Urged	4
Reasons for Granting the Writ	5
Conclusion	6
Brief in Support of the Petition	7
Argument	7
POINT I—A decision of the Commissioner of Internal Revenue is not conclusive but only furnishes *prima facie* evidence of its correctness	7
POINT II—The findings of facts of the Tax Court of the United States are subject to review by the Circuit Court of Appeals to determine if they are supported by evidence	8
POINT III—A taxpayer is allowed to deduct reasonable salaries for personal services actually rendered to it	9
POINT IV—The action of the Board of Directors of a corporation in voting salaries for any given period is entitled to the presumption that such salaries are reasonable and proper.	10
POINT V—The findings of facts of the Tax Court of the United States were contrary to the weight of the evidence	11
Conclusion	11
Appendix	13

TABLE OF CASES CITED:

PAGE

Colorado Nat. Bank of Denver v. *Commissioner*, 305 U. S. 23 ..... 6, 8

General Utilities & Operating Co. v. *Helvering*, 296 U. S. 200 ..... 6, 8

Helvering v. *Kehoe*, 309 U. S. 277 ..... 6, 8
Helvering v. *Rankin*, 295 U. S. 123 ..... 6, 8
Helvering v. *Taylor*, 293 U. S. 507 7
Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481 ..... 6, 8

Lucas v. *Ox Fibre Brush Co.*, 281 U. S. 115 ..... 5, 10

Ox Fibre Brush Co. v. *Blair*, 32 Fed. (2d) 42 (4th Circuit) 5, 10

The Capitol-Barg Dry Cleaning Co. v. *Commissioner*, decided December 2, 1942 ..... 5, 10
Toledo Grain & Milling Co. v. *Commissioner*, 62 Fed. (2d) 171 (6th Circuit) 5, 10

Wickwire v. *Reinicke*, 275 U. S. 101 ..... 5, 7
Williamsport Wire Rope Co. v. *United States*, 277 U. S. 551 ..... 5, 6, 7

OTHER AUTHORITIES CITED:

Internal Revenue Code, Act. Feb. 10, 1939, c. 2, 53 Stat. 1,
Section 1141 ..... 8, 13
Section 23(a) 9, 10
Section 272 14

Judicial Code, as amended by the Act of February 13, 1925,
Section 240(a) 2

Regulations 94,
Article 23 (a) (6) 9, 14

Revenue Act of 1936, c. 690, 49 Stat. 1648,
Section 23(a) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.

L. & C. MAYERS CO., INC.,

Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on November 21, 1942.

Opinion Below.

The opinion of the Tax Court of the United States (R. 33-42) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 65) has not been reported.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals was entered November 21, 1942. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

For each of the fiscal years ended June 30, 1937, and June 30, 1938, the respondent disallowed deductions for compensation to each of the taxpayer's two chief officers in excess of $20,000 per year, which disallowance amounted to $16,000 for 1937 and $20,000 for 1938. The Circuit Court of Appeals of the Second Circuit has held that it was without jurisdiction to review such disallowance of the respondent which made the above disallowance and possibly this was true with respect to the Tax Court. The questions presented are:

I—Whether the Circuit Court of Appeals and the Tax Court have jurisdiction to review the findings of the Commissioner as to the reasonableness of deductions for salaries?

II—Whether a deduction for salaries is to be allowed if it is reasonable or a disallowance of salaries by the Commissioner is to be sustained unless it exceeds any possibly reasonable limits?

III—Whether the salaries paid to each of the taxpayer's two officers for each of the two years were reasonable in amount and therefore deductible by the taxpayer on its income tax return?

Statement.

The facts as found by the Tax Court of the United States (R. 33-37), and as contained in the statement of evidence (R. 48-60) are as follows:

The taxpayer was engaged in the business of distributing diamonds, watches, jewelry and giftware (R. 34). It had only two officers, whose salaries are in question herein, who divided equally the duties of administering the business, one in charge of diamonds, watches and jewelry, and the other in charge of giftware which includes silverware, leather goods, luggage, electrical appliances and similar goods (R. 34, 35).

In the taxable year ended June 30, 1937, the taxpayer had gross sales in the sum of $2,566,028.72, and after deducting the officers' salaries in question herein, had a net income of $144,044.10 (R. 35). In the taxable year ended June 30, 1938, the comparable figures were $2,642,561.10 for gross sales and $211,769.12 for net income (R. 35).

Each officer was an expert in his particular field, having extensive knowledge of the merchandise he handled (R. 35), and the officer in charge of diamonds, watches and jewelry had taken several courses in his field at two universities (R. 56) and made annual trips abroad to the world markets for the merchandise he handled (R. 35, 57). All other employees of the taxpayer performed subordinate duties (R. 49) so that all executive duties were performed by the two officers (R. 48), and when one was abroad, all these duties were assumed by the other (R. 50). Practically the entire business of the taxpayer revolved around the issuing of its annual catalogue (R. 52). The preparation of the catalogue, including the selec-

tion of items, the method of showing them, the type of cuts, and their description and selling price was supervised by these two officers (R. 55), each preparing that part of the catalogue which covered the merchandise he was in charge of (R. 34, 35). The compilation of the catalogue took from April 15th to November 1st (R. 58). Each officer worked approximately eight hours a day except during the Christmas rush season when they worked very long hours (R. 35). Each officer took only a two weeks vacation in each of the two years involved (R. 35). At a special meeting of the Board of Directors of the taxpayer, held December 31, 1936 (R. 59, 35), the salaries of these two officers were increased to $30,000. Prior to 1932, the salary of each officer was $36,000 per annum, their salaries having been reduced during the depression rather than reducing those of their employees (R. 52).

By letter dated April 8, 1940 (R. 11), the respondent disallowed a portion of the salaries of the officers for the years ended June 30, 1937, and June 30, 1938, and found deficiencies against the petitioner of $4,168.97 in income tax, and $4,641.81 in excess profits tax for the year ended June 30, 1937, and $3,550.32 of income tax and $11,754.13 in excess profits tax for the year ended June 30, 1938. The Tax Court of the United States sustained this action of the Commissioner (R. 43) and on appeal to the Circuit Court of Appeals, Second Circuit, this order was affirmed (R. 67).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the action of the respondent in reducing the allowable salaries of the petitioner's officers was beyond the reach of its review.

2. In holding that a disallowance of salaries by the Commissioner of Internal Revenue (regardless of whether such salaries may have constituted a reasonable deduction) is not to be disturbed unless it exceeds any possibly reasonable limits.

3. In failing to hold that the petitioner had sustained its burden of proving the reasonableness of the salaries paid to the petitioner's officers.

4. In failing to hold that the resolution of the petitioner's Board of Directors increasing the salaries of its officers created an inference that the salary allowance was reasonable.

5. In failing to hold that the decision of the Tax Court of the United States in the instant case was against the weight of the evidence.

6. In affirming the decision of the Tax Court of the United States.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals, Second Circuit, in the instant case is in direct conflict with the decision of the Circuit Court of Appeals, Fourth Circuit, in the case of *Ox Fibre Brush Co.* v. *Blair,* 32 Fed. (2d) 42, affirmed in *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115, and with the decisions of the Circuit Court of Appeals, Sixth Circuit, in the cases of *Toledo Grain & Milling Co.* v. *Commissioner,* 62 Fed. (2d) 171, and *The Capitol-Barg Dry Cleaning Co.* v. *Commissioner,* decided December 2, 1942, which has not been reported. It is also in conflict with the principles enunciated by this court in the cases of *Wickwire* v. *Reinicke,* 275 U. S. 101, and *Williamsport*

Wire Rope Co. v. *United States*, 277 U. S. 551, to the effect that a decision of the Commissioner of Internal Revenue is not conclusive but furnishes only *prima facie* evidence of its correctness which is subject to review by the courts in appropriate proceedings; and further conflicts with the principles enunciated by this court in the cases of *Helvering* v. *Rankin*, 295 U. S. 123; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200; *Helvering* v. *Tex.-Penn Oil Co.*, 300 U. S. 481; *Colorado Nat. Bank of Denver* v. *Commissioner*, 305 U. S. 23; and *Helvering* v. *Kehoe*, 309 U. S. 277, to the effect that on review by the Circuit Court of Appeals, the findings of fact by the Tax Court of the United States are not conclusive unless supported by substantial evidence.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW B. TRUDGIAN,
Counsel for Petitioner.